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TABLE OF CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-978

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*,

Petitioners,

v.

RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN PAPER INSTITUTE AS *AMICUS CURIAE*

INTERESTS OF *AMICUS CURIAE*

The American Paper Institute, Inc., (hereinafter "API") is a nonprofit corporation incorporated under the laws of the State of Delaware with its principal place of business at 260 Madison Avenue, New York, New York.

As suggested by its title, API is the representative of more than 200 manufacturers of pulp and paper located

throughout the United States. These companies provide 90 percent of all the pulp, paper and paperboard manufactured domestically. The industry produced in 1975 approximately 52.8 million tons of paper and paperboard and 4.4 million tons of market pulp, amounting to a value of goods shipped of approximately 18.4 Billion Dollars ($18,400,000,000.00). It employs in excess of 281,000 people and pays Three Billion Dollars ($3,000,000,000.00) in wages, salaries and benefits annually.

API and eight of its member companies are petitioners in *American Paper Institute, et al. v. Train, et al.*, Lead Docket No. 74-1480, presently pending before the United States Court of Appeals for the District of Columbia Circuit. API is also a petitioner in *American Paper Institute, et al. v. Train*, Lead Docket No. 76-1524, pending in the United States Court of Appeals for the Third Circuit.[1] Additionally, API filed a brief *amicus curiae* in *American Frozen Food Institute v. Train*, __U.S. App. D.C.__, __F.2d__, 8 E.R.C. 1993 (1976) (Opinion by Judge Edwards of the Sixth Circuit, sitting by designation).

Principal legal issues in those cases as well as this concern an interpretation of the requirements and interrelationship of key provisions of the Federal Water

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[1]The District of Columbia Circuit case challenges regulations promulgated by the Environmental Protection Agency for the "Pulp, Paper, And Paperboard Point Source Category," 39 *Fed. Reg.* 18742 (1974). These regulations applied to approximately one-third of the industry. Briefing and oral argument have been completed, and the parties are awaiting a decision by the court.

The case pending in the Third Circuit challenges regulations promulgated by the Environmental Protection Agency for the industry which apply to the remaining two-thirds of point sources. 41 *Fed. Reg.* 7662 (Feb. 19, 1976).

Pollution Control Act Amendments of 1972 (hereinafter "FWPCA" or "the Act"), particularly Sections 301, 304 and 402, 33 U.S.C. §§1311, 1314 and 1342, which establish the basic regulatory scheme for controlling discharges from existing industrial point sources.

This brief *amicus curiae* treats two major issues which confront the Court in this case. First, API submits that the United States district courts have jurisdiction to review regulations governing discharges from existing industrial point sources. Second, API submits that EPA has illegally promulgated rigid single-number effluent limitations for broad subcategories of existing sources. The clear language of the statute and its legislative history reveal Congress' intent to regulate existing sources through the application of Section 304 *guidelines for effluent limitations* by the permit-granting authorities when issuing permits for existing point sources.

The brief filed by petitioners in this case raises certain issues challenging the Environmental Protection Agency's (hereinafter "EPA" or the "Agency") interpretation of the FWPCA. API has raised similar arguments which not only challenge the regulatory scheme established by the Agency but which provide the Court with an extensive statutory analysis and review of the legislative history in an effort to show the Court the regulatory scheme intended by the Congress. Consideration of this brief *amicus curiae* will ensure that the Court has before it a full range of views by directly affected parties on these important issues. The Court's decision in this case will have major economic and social consequences on the implementation of the water pollution control program of the United States. Finally, the implementation of the Act has a significant and direct economic impact on *amicus curiae's* member companies. A reversal of the

Fourth Circuit decision by this Court will result in the practical and realistic water pollution control program envisioned by the Congress.

Amicus curiae has obtained the consent of counsel from petitioners and respondent for the filing of this brief in accordance with Rule 42.2 of this Court. Those consents are contained herein as Appendices A and B to this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 528 F.2d 1136 (4th Cir. 1975). The opinion and order of the district court is reported at 383 F. Supp. 1244 (W.D. Va. 1974).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the regulations promulgated by the Environmental Protection Agency for existing sources are reviewable as guidelines for effluent limitations in the United States district courts pursuant to the Administrative Procedure Act, 5 U.S.C. §§701-706 (1970)?

2. Whether the Environmental Protection Agency misinterpreted Sections 301 and 304 of the FWPCA by promulgating single-number effluent limitations rather than promulgating ranges of numbers as guidelines with instructions to permit-granting authorities to consider factors outlined in Section 304 when prescribing effluent limitations for discrete point sources?

STATUTES INVOLVED

The following statutory provisions are set forth in relevant part in Appendix C: The Federal Water Pollution Control Act, as amended, Sections 301, 302, 304, 306, 307, 309, 401, 402, 502, 505 and 509 (33 U.S.C. §§1311, 1312, 1314, 1316, 1317, 1319, 1341, 1342, 1362, 1365 and 1369).

SUMMARY OF ARGUMENT

The regulations promulgated by EPA for existing point sources in the inorganic chemical industry as well as all other industrial point sources are reviewable in the United States district courts pursuant to the Administrative Procedure Act.

First, Sections 301 and 304 of the FWPCA mandate the issuance by the Agency of *guidelines for effluent limitations.* Section 301 of the FWPCA requires the achievement by industry of effluent limitations by July 1, 1977, which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b)(1) of the Act. Section 301 of the Act further provides that effluent limitations shall be achieved by July 1, 1983, requiring the application of best available technology economically achievable as determined in accordance with regulations issued pursuant to Section 304(b)(2) of the Act.

Section 301, by its terms, depends for its implementation upon Section 304, which provides that, within one year of the statute's enactment, regulations defining guidelines for effluent limitations shall be promulgated by the Agency. The guidelines shall, among other things, specify the factors to be taken into consideration in

determining the control measures to be utilized for meeting the Section 301 objectives. Accordingly, the statute on its face clearly mandates the issuance of guidelines for effluent limitations pursuant to Section 304(b) of the Act.

Second, the Agency's own construction and interpretation of the Act, beginning with the Act's passage and ending with the notice of proposed rulemaking, demonstrated that EPA intended to issue guidelines for effluent limitations. Prior to and subsequent to the Act's passage, published and spoken statements by Agency officials established that EPA intended to publish guidelines for effluent limitations pursuant to Section 304(b) of the Act. In early 1974, however, in an attempt to circumvent the required administrative procedure, the Agency reversed its position and claimed that the regulations, which had the effect of limitations, were being issued pursuant to Sections 301 *and* 304 of the Act. The inconsistency in the Agency's position is highlighted by its wholesale disregard for the necessity of adjudication prior to the establishment of specific effluent limitations.

Third, Section 304(b) guideline regulations are reviewable in federal district court pursuant to the Administrative Procedure Act. Unless otherwise specified by statute, the proper forum for judicial review of federal agency decisions is the district court. Section 509 of the Act, which sets forth specific Agency actions reviewable in the United States courts of appeals, does not provide for judicial review of Section 304(b) guidelines. Accordingly, Section 304(b) guidelines for effluent limitations are properly reviewable in the federal district courts, and this Court should so hold.

EPA has ignored the plain meaning of the FWPCA and the congressionally determined need for flexible guide-

lines and has usurped the responsibilities of the permit-granting authorities by illegally promulgating effluent limitations for existing sources rather than issuing guidelines for effluent limitations pursuant to Section 304(b). The effect of EPA's act is to relegate the role of the permit-granting authorities to a clerical, rubber-stamping exercise and to preclude consideration of individual plant characteristics when issuing permits.

The FWPCA represents a comprehensive statutory scheme for the regulation of the discharge of pollutants into navigable waters. Section 301 sets forth the Act's primary objectives in broad terms: the installation of best practicable control technology currently available by 1977 and best available technology economically achievable by 1983 for all industrial point sources. This broad goal is implemented through the federal-state partnership in which state permit-granting authorities or, alternatively, the EPA's Regional Administrators are charged with issuing permits establishing specific effluent limitations for point sources pursuant to Section 402 of the Act. The federal role is outlined in Section 304(b) of the Act, which requires the Administrator to provide guidance to the permit-granting authorities by promulgating guidelines for effluent limitations for various industrial categories. Section 304 provides a mechanism for identifying the 1977 and 1983 technologies and further requires the Administrator to identify "the degree of effluent reduction attainable" by their application. In addition, the Administrator is required to "specify factors to be taken into account" by the permit-granting authorities when establishing particular effluent limitations for individual sources. This interpretation of the FWPCA is consistent with the statutory language, the legislative history and the preenactment and postenactment interpretations of the Act by the Agency.

The positions taken by API on the issues discussed above have been supported in the courts and in the Congress. In *CPC Int'l, Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975), the court concluded that EPA's existing source regulations were not reviewable in the courts of appeals but rather in the district courts. In the *CPC* case as well as in *American Iron and Steel Institute v. Environmental Protection Agency*, 526 F.2d 1027 (3d Cir. 1975), and *Grain Processing Corp. v. Train*, 407 F. Supp. 96 (S.D. Iowa 1976), *appeal pending*, No. 76-1233 (8th Cir.), the courts held that the Agency was under an obligation to promulgate guidelines for effluent limitations in the form of a range. These courts also required the Agency to specify factors for the permit-granting authorities to take into consideration when determining specific effluent limitations for discrete point sources. Finally, the House Subcommittee on Investigations and Review of the Committee on Public Works held oversight hearings on EPA's implementation of the FWPCA during the summer of 1974. Through its chairman, the Subcommittee registered its concern that EPA's nationally applicable single-number effluent limitations for existing sources were too rigid, impractical and contrary to the more flexible regulatory scheme that Congress intended.

ARGUMENT

I.

REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY FOR EXISTING SOURCES ARE REVIEWABLE AS GUIDELINES FOR EFFLUENT LIMITATIONS IN THE UNITED STATES DISTRICT COURTS PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§701-706 (1970).

The United States Court of Appeals for the Eighth Circuit has determined that district courts have jurisdiction to review guidelines for existing sources promulgated pursuant to Section 304(b) of the Act. *CPC Int'l, Inc. v. Train, supra.*[2] API urges this Court to adopt the fundamental concepts in the Eighth Circuit's opinion as they relate to regulations for existing point sources. Additionally, API submits that there are numerous other reasons not considered by the Eighth Circuit which preclude judicial review by the courts of appeals of existing source regulations promulgated pursuant to the FWPCA.

A. The Statutory Framework Established By Congress Contemplated The Issuance Of Guidelines By EPA Pursuant To Section 304(b) Of The Act.

The 1972 amendments to the Federal Water Pollution Control Act fundamentally revised the statutory and regulatory schemes for control of water pollution. Prior to the enactment of the FWPCA, the federal regulatory emphasis had been on the maintenance of water quality standards which had been established throughout the

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[2] The Eighth Circuit was asked to review regulations for existing sources engaged in the processing of corn in the corn wet milling subcategory of the grain mills point source category. 40 C.F.R. §§406.10-406.16.

country. Although this approach was not entirely abandoned by the FWPCA, the primary focus of the 1972 legislation shifted from water quality to control and limitation of effluent discharge from industrial plants into navigable waters. The statutory objective of a regulatory program for industrial and municipal point sources of waste discharges is set forth in Section 301 of the Act, 33 U.S.C. §1311. By its own terms, Section 301 depends for its implementation upon Section 304, 33 U.S.C. §1314.

It is manifest, given the language of the statute, that Section 304 requires the issuance by the Agency of guidelines for effluent limitations pursuant to Section 304(b) of the statute prior to the implementation of Section 301 limitations. *CPC Int'l, Inc. v. Train, supra* at 1038. The statutory mandate was emphasized by the decision of the United States District Court for the District of Columbia in *Natural Resources Defense Council, Inc. v. Train*, 6 E.R.C. 1033 (D.D.C. 1973).[3] In that case, plaintiff brought a citizen's enforcement action under Section 505 of the Act, seeking to compel the Administrator to perform a nondiscretionary duty under

[3]That order was subsequently stayed in part and reversed on other grounds by the United States Court of Appeals for the District of Columbia Circuit, per Leventhal, Robb and Nichols, JJ., by memorandum dated October 7, 1974 and later modified accordingly by the United States District Court for the District of Columbia, per Green, J., on November 1, 1974.

On December 5, 1974, in *Natural Resources Defense Council, Inc. v. Train*, 166 U.S. App. D.C. 312, 510 F.2d 692 (1974), *as modified*, March 10, 1975, the United States Court of Appeals for the District of Columbia reversed and remanded the lower court's decision as to certain regulations but upheld the district court's ruling as to others. This decision related solely to the scheduling of promulgation of effluent limitation guidelines for industrial point sources by EPA.

the Act, namely, the issuance of Section 304(b) guideline regulations. In granting in part plaintiff's motion for summary judgment, the district court issued an order which stated:

> 1. Defendants have a mandatory, nondiscretionary duty to publish within one year of enactment of the Act final Section 304(b)(1)(A) *effluent limitation guidelines* necessary to provide comprehensive coverage of all point source discharges;
>
> 2. The proposed schedule for publication of the guidelines shall have a final deadline of no later than October 1, 1974, *in order that the guidelines may be applied meaningfully in the NPDES permit program established by Section 402 of the Act.* 6 E.R.C. at 1033. (Emphasis added.)

Accordingly, the Act on its face, buttressed by these judicial opinions, mandates the issuance of Section 304(b) guidelines for effluent limitations.

The requirement that the Agency issue Section 304(b) guidelines for effluent limitations was clearly stated in *CPC Int'l, Inc. v. Train, supra.* In the *CPC* case, as it did in the Fourth Circuit below, the Agency argued that regulations for existing sources were promulgated pursuant to both Sections 301(b) *and* 304(b) of the Act in an effort to gain access to the courts of appeals under Section 509 of the Act. The Agency's effort to gain such access, however, was discredited by the court in the *CPC* case. The court stated:

> Although policy arguments are advanced on behalf of a contrary interpretation by the EPA and by amicus Natural Resources Defense Council, Congress has resolved the policy issues against their position. 515 F.2d at 1037.

To reach the conclusion that guidelines for effluent limitations could not be promulgated pursuant to Section 301 and that the Act required EPA to issue such guidelines pursuant to Section 304(b), the Eighth Circuit examined the language of the statute and its legislative history. 515 F.2d at 1037. The court concluded that "the statute does not grant to the Administrator a separate power under §301 to promulgate by regulation effluent limitations for existing sources." 515 F.2d at 1037. Accordingly, the court determined that Section 509 of the Act could not constitute the jurisdictional basis for the courts of appeals to review regulations for existing sources.

Perhaps the clearest articulation of what the statute requires and what the obligations of the Agency are in implementing the statute is set forth in the district court's opinion arising out of the remand of the *CPC* case. In that case, Judge Stewart wrote:

> As the court interprets the language of Section 304(b), the guideline regulations to be promulgated by the EPA are meant to set forth two basic standards for both the 1977 and the 1983 technologies. First, the guidelines are to "identify . . . the degree of effluent reduction attainable through the application of the . . . technology . . . for classes and categories of *point sources* . . . ." Section 304(b)(1)(A). The Congress has directed the EPA to determine for each class or category of point sources how much effluent reduction can be achieved through the application of the appropriate technology. Second, the guidelines should specify the factors which may be taken into account in determining, for each individual *point source*, the best measures to achieve the application of the relevant technology. Thus, the guideline regulations are to

> be two-pronged. They should state the effluent reduction possible for the entire class or category of point sources within a given range and they should also analyze those factors deemed important for the writing of an individual permit within that range. *Grain Processing Corp. v. Train, supra* at 104.

Although other courts have had an opportunity to review the implementation and interpretation of the Act by the Agency, these courts have not been as explicit in defining the Administrator's obligations when promulgating regulations for existing sources. In *American Iron and Steel Institute v. Environmental Protection Agency*, 526 F.2d 1027 (3d Cir. 1975), the court made a somewhat convoluted effort to adopt EPA's argument that it could simultaneously issue regulations pursuant to Sections 301 and 304. The court determined that it did have exclusive jurisdiction to review the regulations promulgated by the Agency for the iron and steel industry; however, it also determined that the Agency was required to establish a range of such effluent limitations in the form of guidelines for effluent limitations pursuant to the congressional mandate in Section 304(b). Thus, the court stated:

> Having determined the "base level," and the "ceiling," he (the Administrator) must then promulgate guidelines which are to guide the permit-issuing authorities in deciding whether, and by how much, limitation to be applied to any individual point source is *more* stringent than the base level (in terms of requiring more effective technology), and more stringent than the ceiling (in requiring a lower amount of effluent discharge). *Thus, we reconcile Sections 301 and 304 in the following manner: The Section 301 limitations represent both the base level or minimum degree of effluent control permissible*

> *and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the Section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling.* 526 F.2d at 1045. (Emphasis added.)

Because of the absence of a range, the Third Circuit regulations were remanded to the Agency for promulgation of regulations including a range and factors to be considered by the permit-issuing authorities.

API submits that the Third Circuit was half correct. That is, the statute does require that effluent limitations guidelines be issued in the form of a range and that factors be specified to be considered by the permit-granting authorities in the application of the range to individual point sources. *See infra* at 29-46. However, API also submits that the Third Circuit's effort to sanction the Agency's Section 301 and Section 304 combined rulemaking theory is incorrect.

Other courts of appeals that have considered the issue of jurisdiction to review the regulations promulgated by the Agency have dealt inadequately with the issues before them. For example, in *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442 (7th Cir. 1975), the court determined that the regulations challenged by the meat industry were subject to its review. In reaching this conclusion, however, the court relied on the argument that, where courts of appeals differ in construing regulatory statutes, it should defer to the Agency even though the Agency's interpretation of the statute is not "the only one it permissively could have adopted." 526 F.2d at 449-50, citing *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75

(1975). While this argument, in the absence of a clear legislative history or a statutory mandate, may be applicable to technical issues peculiarly within the expertise of the regulatory agency, the argument does not apply to the issue of jurisdiction. Jurisdiction is solely within the province of the congress. The import of the Seventh Circuit's decision is that the Agency may, by its own interpretation of the statute, determine what court shall have jurisdiction to review its actions. Such an approach is indefensible in view of this Court's prior pronouncements on the issue of what body determines jurisdiction to review Agency actions. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), discussed *infra* at 28-29.

Similarly, the Second Circuit, in *Hooker Chemicals & Plastics Corp. v. Train*, ___F.2d___, 8 E.R.C. 1961 (2d Cir. 1976), approved EPA's promulgation of limitations pursuant to Section 301 and Section 304, although it stated that it did so "against [a] background of puzzling statutory language, ambiguous legislative history and conflicting court decisions." 8 E.R.C. at 1965.

It is API's position, as developed below, that regulations for existing sources promulgated by the Agency constitute guidelines for effluent limitations. This position is supported by the statutory language of the Act and the legislative history. Further, API submits that the Agency itself recognized its obligation under Section 304(b) but chose, as a matter of expediency, to deviate from the statutory mandate by publishing effluent limitations in the form of specific numeric values to be nationally applied to a given category of industrial point sources without consideration of individual plant characteristics as set forth in the Act. This Court should determine that, irrespective of the Agency's belated

characterization of its regulations as "limitations," the Agency is required by the Act to issue and did, in fact, issue Section 304(b) guidelines reviewable in the United States district courts pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§701-706 (1970).

B. The Agency's Own Construction Of The Act Demonstrated That EPA Issued Guidelines For Effluent Limitations Pursuant To Section 304(b) Of The Act.

Shortly after the Act's initial passage by the House and Senate, but prior to its final enactment on October 18, 1972, the then Administrator of EPA, the Honorable William D. Ruckelshaus, gave a speech before the annual meeting of the Water Pollution Control Federation in Atlanta, Georgia, at which he stated in reference to the new Act:

> *Every plant involves individual factors which differentiate it from others and directly affect what would be the best practicable control technology for that plant. EPA's guidelines* . . . will represent the most comprehensive effort ever made on a national basis to provide information with respect to industrial water control technology. However, to do the job on specific plants will take the full-time efforts of hundreds of Federal and State pollution control people, working as a team . . . .
>
> The *EPA guidelines*, whether issued under the new law or otherwise, will not be the final answer to pollution control questions. . . . (Emphasis added.)[4]

This passage demonstrates that the Agency's construction of the Act, contemporaneous with its passage, reflected

[4]The speeches of the Administrator are available at the Public Information Office of EPA in Washington, D.C.

the need for "guidelines" to be individually applied to each point source. Such "guidelines" are manifestly responsive to Section 304(b).

Five months later, the Agency transmitted a letter to the Effluent Standards and Water Quality Information Advisory Committee (hereinafter "ESWQIAC") stating that it was embarking upon the preparation of Section 304(b) guideline regulations.[5]

Approximately ten months after the Administrator's speech, EPA published in the *Federal Register*, "Effluent Limitations Guidelines And Standards Of Performance For New Sources—Advance Notice of Public Review Procedures," 38 *Fed. Reg.* 21202 (1973). That publication announced:

> Advanced notice is hereby given concerning notices of proposed rule making to be published by the Environmental Protection Agency ("EPA") with respect to effluent limitations *guidelines*, standards of performance, and pretreatment standards for new sources pursuant to sections 304(b), 306 and 307(c) of the Federal Water Pollution Control Act, as amended . . . . (Emphasis added.)

[5]Section 515(b)(1) of the FWPCA establishes the Effluent Standards and Water Quality Information Advisory Committee:

> No later than one hundred and eighty days prior to the date on which the Administrator is required to publish any proposed regulations required by section 304(b) of this Act, . . . he shall transmit to the Committee a notice of intent to propose such regulations.

The court in the *CPC* case recognized that, if EPA were authorized to promulgate regulations under Section 301, "one would expect §515 to require a reference to the ESWQIAC in such instances." 515 F.2d at 1039.

The legal authority for this announcement was explained as follows in the notice:

> Section 301(b) of the Act requires the achievement . . . of effluent limitations for point sources, . . . which require the application of the best practicable control technology currently available *as defined by the Administrator pursuant to Section 304(b)* . . . . (Emphasis added.)

It is Section 304(b) of the Act that requires the Administrator to publish "regulations providing guidelines for effluent limitations setting forth the degree of effluent reduction attainable through the application of the best practicable control technology currently available . . . ." Thus, EPA, as late as ten months after enactment of the FWPCA, notified the public of its mandated obligation and intent to publish Section 304(b) guidelines. Nowhere does the August 6, 1973 publication hint that the regulations will contain or constitute *effluent limitations per se;* nowhere does EPA point to authority for such action nor its intention to pursue such an ill-advised course.

The unambiguous authority for the Agency's issuance of guidelines pursuant to Section 304(b) of the Act is further underscored by the "Proposed Guidelines and Standards for the Pulp, Paper and Paperboard Manufacturing Point Source Category," 39 *Fed. Reg.* 1908 (1974). That publication referred back to the August 6, 1973 publication and again recited the legal explanation quoted above:

> The regulations proposed herein set forth effluent limitations guidelines, *pursuant to Section 304(b) of the Act* . . . . (Emphasis added.)

It is, therefore, beyond question that the Act, its contemporaneous administrative interpretations and

EPA's *Federal Register* notices all advised that Section 304(b) guidelines were not only required but would be forthcoming.

EPA now claims, however, that its regulations for existing sources constitute "effluent limitations" under Section 301(b) as well as guidelines under Section 304(b). Therefore, EPA contends that they are reviewable only in the United States court of appeals, pursuant to Section 509 of the Act and not in the United States district courts.

Respondent bases its argument on an eleventh-hour memorandum that was prepared by EPA's Assistant Administrator for Enforcement and General Counsel, entitled "Environmental Protection Agency Memorandum On Judicial Review Of Effluent Limitations Guidelines," February 25, 1974, 4 *Env. Rptr., Current Developments,* 1833 (Mar. 1, 1974). That document takes the position that Sections 301 and 304 are identical and that neither section has an independent existence:

> A final factor . . . relates to the relationship between Sections 301 and 304. Section 509(b) makes no mention of judicial review of the Section 304(b) guidelines for effluent limitations. However, the effluent limitations guidelines which the Agency is presently issuing under Section 304(b) are also being issued under Section 301 and establish effluent limitations under Section 301. Thus, these guidelines fall within the provision in Section 509(b) for judicial review within 90 days of "any effluent or other limitation under section 301." The effluent limitations guidelines promulgated by the Agency will implement both Section 301 and Section 304. Since it would be impossible to challenge the Section 301 limitations without challenging the Section 304(b) guidelines, the requirements in Sec-

> tion 509(b) that limitations promulgated pursuant to Section 301 be challenged in the United States Court of Appeals and within 90 days also must be considered to include challenges to Section 304 guidelines. *Id.* at 1834.

This after-the-fact memorandum constitutes a bootstrapping exercise. Neither the August 6, 1973 nor the January 15, 1974 publication in the *Federal Register* (proposed regulations for the paper industry), *supra*, purports to implement Section 301. Both of those documents unequivocally cite Section 304(b) as their legislative predicate. Section 301 is merely cross-referenced.[6]

The Agency's attempt to short-circuit the carefully prescribed statutory scheme set forth by Congress and the Agency's further attempt to divest petitioners of federal district court judicial review cannot be countenanced. The Agency has combined several steps clearly delineated in the Act into a single step and has promulgated regulations affecting all industries with complete disregard for the factors enumerated in Section 304 and the licensing role established in Section 402.

The inconsistency in and the illegality of this position as maintained by the Agency are brought into bold relief by reference to the distinction between administrative rule-making and adjudication.

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[6]After the fact, following publication of the February 25, 1974 memorandum, EPA's final regulations state in their preamble:

> This final rulemaking is promulgated pursuant to sections *301*, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act, as amended.... 39 *Fed. Reg.* at 18742. (Emphasis added.)

Administrative procedures for rulemaking and adjudication are governed by the Administrative Procedure Act, 5 U.S.C. §§553 and 554 (1970). "Rulemaking" refers to administrative promulgation of regulations of general applicability, without reference to specific conditions in a particularized application of the rules. *Pacific Coast European Conference v. Federal Maritime Comm'n*, 126 U.S. App. D.C. 230, 376 F.2d 785 (1967). Section 553 of the Administrative Procedure Act provides, in relevant part, that:

> (b) General notice of proposed rule making shall be published in the Federal Register....
>
> * * *
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

"Adjudication," on the other hand, refers to case-by-case determinations made by an administrative agency. Section 554 of the Administrative Procedure Act, governing adjudications, states:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing....
>
> * * *
>
> (b) Persons entitled to notice of an agency hearing shall be timely informed of—
>
> (1) the time, place, and nature of the hearing;
>
> (2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

* * *

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

The distinction between rulemaking and adjudication with respect to administrative due process considerations is readily apparent from a juxtaposition of these two sections. Administrative due process in a rulemaking proceeding is satisfied by the opportunity for public comment upon adequate public notice. Due process in an adjudicatory proceeding, on the other hand, requires in most cases a public hearing, development of a record, justification of the Agency's position and an opportunity for scrutiny thereof, including examination of witnesses. *Goldberg v. Kelly*, 397 U.S. 254 (1970). The requirement in an agency-related statute that a hearing be held prior to agency action signals the application of adjudicatory rather than rulemaking proceedings under the Administrative Procedure Act. *LaRue v. Udall*, 116 U.S. App. D.C. 396, 324 F.2d 428 (1963), *cert. denied*, 376 U.S. 907 (1964); *Gardner v. United States*, 239 F.2d 234 (5th Cir. 1956).

Applying these standards to the facts of this case, it is clear that the Agency perceived its role in promulgating effluent limitations guidelines as rulemaking rather than adjudication. For example, in denying API's request for a

formal public hearing prior to promulgation of the paper industry regulations, Mr. Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel of EPA, remarked:

> The general rulemaking requirements of Section 553 of the Administrative Procedure Act only require that notice and opportunity to comment on proposed regulations be provided. *See* Appendix D.

If EPA had restricted itself to the issuance of effluent guidelines pursuant to Section 304 of the FWPCA, as API submits EPA should have done, then General Counsel Kirk's interpretation and response would have been appropriate. Section 304, by itself, does not contemplate adjudication in discrete cases but rather mandates the issuance of guideline regulations for the entire industry through the vehicle of rulemaking.

Section 402 of the FWPCA, however, which establishes the permit program whereby individual dischargers would apply for and receive permits to discharge in conformance with an effluent limitation requires an adjudicatory proceeding for each permit applicant. Section 402(a)(1) provides:

> . . . the Administrator may, *after opportunity for public hearing*, issue a permit for the discharge of any pollutant, or combination of pollutants. . . . (Emphasis added.)

Section 402(b) provides, in part:

> At any time after the promulgation of the guidelines required by subsection (b)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish * * * The

> Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:
>
> * * *
>
> (3) To insure that the public, and any other State the waters of which may be affected, receive *notice* of each application for a permit and to *provide an opportunity for public hearing before a ruling on each such application*. . . . (Emphasis added.)

In promulgating specific effluent limitations and thereby usurping the permit-granting role of the states under Section 402, the Agency should have at least provided the same rights guaranteed by the Administrative Procedure Act for adjudicatory proceedings to its own proceedings for its actions to be even colorably legal. Yet, when API requested such a public hearing prior to EPA's admitted promulgation of specific limitations for the paper industry, this opportunity was denied by the Agency. *See* March 25, 1974 letter from Mr. Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel, EPA, to Mr. Thomas H. Truitt, counsel for API. *See* Appendix D.[7]

The significance of the Agency's maneuvers, when viewed in the context of "rulemaking" versus "adjudication," is at once obvious. EPA has sought to invoke the rulemaking intent of Section 304 in frustrating API's attempts for a full-scale hearing while at the same time

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[7]The Agency has promulgated regulations governing adjudicatory hearings at the permit-granting stage. 40 C.F.R. §125 *et seq.* These regulations provide for representation, prehearing conferences, oral and written testimony, including cross-examination of witnesses, and a ruling on the record, among other procedural safeguards. Thus, the Agency recognizes that the individual application for a permit does require an adjudicatory proceeding.

engaging in *de facto* adjudication as contemplated by Section 402. The result of the Agency's machinations has been to deprive API and other industries of substantial administrative due process hearing rights that would have accrued were the Section 402 permit process implemented as contemplated by the statute rather than as misperceived by the Agency.

EPA should not be permitted to have it both ways and engage in adjudication under the guise of rulemaking. This Court should accordingly recognize that the scope of the Agency's discretion at this stage of the Act's implementation is limited to the establishment of guidelines and that this is not only manifest from the language of the statute but also was acknowledged by EPA in its initial response to the FWPCA's passage.

C. Section 304(b) Guideline Regulations Are Reviewable In Federal District Court Pursuant To The Administrative Procedure Act.

Unless committed to agency discretion or specifically precluded by Congress, administrative action shall be subject to judicial review, 5 U.S.C. §701 (1970); *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967); *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962). The proper forum for judicial review in an administrative law case is a United States district court unless otherwise specified by statute. The Administrative Procedure Act, 5 U.S.C. §703, provides in pertinent part as follows:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declara-

> tory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

Section 509 of the FWPCA sets forth the specific Agency actions which are reviewable in courts of appeals. Section 304 is not mentioned in Section 509, and, therefore, the United States district courts have jurisdiction to review regulations for existing sources.

Section 509(b) provides:

> (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) *in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person.* Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day. (Emphasis added.)

Where statutory language is clear and unambiguous, courts are bound by the congressional intent. *See Jay v. Boyd*, 351 U.S. 345, 357 (1956); *Lewis v. United States*, 92 U.S. (2 Otto) 618, 621 (1876). Section 509(b) specifies certain administrative actions pursuant to various provisions of the Act that are reviewable in the courts of appeals; Section 304 is conspicuously omitted. Under these circumstances, there is no basis on which to allege any ambiguity, and, therefore, Section 304 guidelines are reviewable pursuant to the Administrative Procedure Act. *CPC Int'l, Inc. v. Train, supra* at 1034.

A related principle of statutory construction restricts the judiciary from adding words to statutory language. *62 Cases, Etc. v. United States*, 340 U.S. 593, 600-01 (1951); *DeSoto Securities Co. v. Commissioner of Internal Revenue*, 235 F.2d 409, 411 (7th Cir. 1956). Yet EPA's position would require the Court to do just that. Further, it is an axiom of statutory construction that a legislative reference to a series of provisions or matters which omits a provision or matter of similar nature is indicative of legislative intent to treat the nonreferenced provision differently than those mentioned. *Case v. Kelly*, 133 U.S. 21 (1890); *Maiatico v. United States*, 112 U.S. App. D.C. 295, 302 F.2d 880 (1962). Certainly, the omission of Section 304 from Section 509(b) was not a legislative oversight and, therefore, its omission cannot be ignored by this Court. *Commonwealth of Kentucky ex rel. Hancock v. Ruckelshaus*, 362 F. Supp. 360, 365 (W.D. Ky. 1973), *aff'd*, 497 F.2d 1172 (6th Cir. 1974), *aff'd sub nom. Commonwealth of Kentucky v. Train*, ___U.S.___, 8 E.R.C. 2100 (1976).

Moreover, an integrated reading of the FWPCA shows that Congress did not intend to include Section 304(b) regulations under the review provisions of Section 509. The conclusion that the United States courts of appeals are not the proper forum for review is confirmed by recent amendments to the FWPCA, Pub. L. No. 93-207, 87 Stat. 906 (1973). The purpose of the 1973 amendments was correction of "oversights or incorrect refer-

ences . . . [that] do not alter the substance of the Act or depart from the original intent of Congress." H.R. Rep. No. 680, 93d Cong., 1st Sess. (1973). Although Congress revised Section 509, the only modification consisted of an incorporation of pretreatment standards under Section 307(b) as being subject to review under Section 509. Congress again did not include Section 304(b) guidelines on the list of actions subject to special review under Section 509(b).

A plain reading of the statute also substantiates the conclusion that Section 304(b) was not intended to be covered by Section 509(b). First, United States district court review is specifically mentioned in connection with the grant of subpoena power to the Administrator of EPA in the very same statutory section covering courts of appeals jurisdiction, thus illustrating that the courts of appeals do not have exclusive jurisdiction to review all provisions of the Act. Section 509(a)(2), 33 U.S.C. §1369(a)(2). Second, there are numerous adjudicatory and rulemaking functions to be performed by EPA that are not covered by Section 509 and, therefore, are reviewable pursuant to the Administrative Procedure Act.[8]

A useful precedent for resolving the issue before this Court is *Abbott Laboratories v. Gardner, supra.* In *Abbott,* plaintiff sought United States district court review. The government argued unsuccessfully that review was lodged in the courts of appeals based upon a provision in the Food, Drug and Cosmetic Act, 21 U.S.C.

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[8]Sections 201, 204(b)(2), 208 and 212; Sections 303 and 311; Sections 304(a), (c), (d), (e), (f), (g) and (h); and Sections 403, 404 and 405 are all regulatory actions reviewable pursuant to the Administrative Procedure Act in the district courts.

§371, which provided for review of certain regulations in the courts of appeals. The court concluded that the provision relied upon by the government was limited in scope and did not control jurisdiction to review actions taken by the Commissioner to implement sections of the statute not covered by that provision. A similar rationale should be applied by the Court in this case to support the determination that the United States district court has jurisdiction over this case.

II.

THE ENVIRONMENTAL PROTECTION AGENCY MISINTERPRETED SECTIONS 301 AND 304 OF THE FWPCA BY PROMULGATING SINGLE-NUMBER EFFLUENT LIMITATIONS RATHER THAN PROMULGATING RANGES OF NUMBERS AS GUIDELINES WITH INSTRUCTIONS TO PERMIT-GRANTING AUTHORITIES TO CONSIDER FACTORS OUTLINED IN SECTION 304 WHEN PRESCRIBING EFFLUENT LIMITATIONS FOR DISCRETE POINT SOURCES.

The Environmental Protection Agency improperly issued single-number effluent limitations rather than *guidelines* for effluent limitations in its regulations for existing sources. This interpretation and administration of the FWPCA is wrong and cannot be fairly or sensibly applied to any complex and diverse industry. EPA failed to understand the distinction between effluent limitations and guidelines for effluent limitations.

A review of Sections 301, 304 and 402 against the background of the 1972 legislation shows that EPA's interpretation of the FWPCA as demonstrated by the Agency's implementation of these sections is contrary to the statute and technologically simplistic. The illegality of EPA's actions is confirmed by the Eighth Circuit's opinion in *CPC Int'l, Inc. v. Train, supra,* and the sub-

sequent district court decision in *Grain Processing Corp. v. Train, supra,* both of which concluded that EPA does not have the authority to issue regulations for existing sources pursuant to Section 301(b) but is required to promulgate guidelines for effluent limitations pursuant to Section 304(b). Further support for API's position is found in *American Iron and Steel Institute v. Environmental Protection Agency, supra,* for the proposition that EPA must issue a range of limitations for industrial categories and specify factors for the permit-granting authorities to consider in order to comply with Section 304(b) of the Act.

A. Sections 301, 304 And 402 Of The FWPCA Require The Administrator Of EPA To Issue "Guidelines For Effluent Limitations" And To "Specify" Factors Enumerated In Section 304 To Be Taken Into Account In The Application Of The Guidelines To A Specific Point Source.

Section 301 sets forth the goals of the FWPCA for treatment of waste from industrial sources. Section 301 requires that the 1977 and 1983 goals are to be defined by the Administrator pursuant to Section 304 of the Act. By its own terms, Section 301 depends upon Sections 304 and 402 for its implementation. Section 304(b), in turn, establishes how "guidelines for effluent limitations" are to be developed. Section 301 states objectives but has no independent standing. Once having established "guidelines for effluent limitations," the next stage in the regulatory process requires the application of the technology-based guidelines prescribed by Section 304 to individual point sources discussed in Section 301. This is accomplished by the Section 402 permit program.

Simply stated, the statutory scheme requires EPA to publish "guidelines for effluent limitations" to be achieved by all existing sources by 1977 and 1983. These

guidelines may take various forms, either as numeric ranges within which a particular source must be placed or as numeric guidelines, which serve as guideposts to the permit-granting authorities. The factors enumerated in Section 304 are essential to determining the application of the guidelines to a specific source.[9]

EPA's contention that it may promulgate regulations pursuant to Section 301 is without merit. In *CPC Int'l, Inc. v. Train, supra,* the court concluded that Section 301 does not permit EPA to promulgate effluent limitations for existing sources by regulation and that the "permit-issuing authority is to follow the guidelines promulgated under §304(b), and not to refer to independent regulations promulgated under §301." 515 F. 2d at 1038.[10]

1. The Plain Meaning Of Section 304 Confirms The Administrator's Obligation To Promulgate Guidelines And To Specify Factors.

The pivotal role of Section 304 regulations as a reference point for permitting authorities is firmly anchored in the statutory text. An attentive reading of

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[9]By requiring 304(b) regulations to take the form of a range accompanied by specified factors, the Congress did not intend to provide permit-granting authorities *carte blanche* in establishing effluent limitations for individual point sources. The Congress did intend, however, to have the Administrator set boundaries within which all permit-granting authorities would have to make decisions to ensure rigorous regulation of industrial point sources.

[10]In reaching this conclusion, the Eighth Circuit relied on Section 402(d)(2) of the Act, which states in pertinent part:

> No permit shall issue * * * (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as *being outside the guidelines* and requirements of this Act. (Emphasis added.)

Section 304 conveys the design of the scheme Congress envisioned. The statute refers to guidelines.[11]

The guidelines of Section 304(b) are determined by a two-step procedure undertaken by the Administrator. First, the Administrator is to identify the degree of effluent reduction attainable through the application of (a) best practicable control technology and (b) best available technology. Second, the guidelines are to specify factors to be taken into account by permit-granting authorities when prescribing particular effluent limitations for individual point sources.

The choice of the word "guidelines" is suggestive of a range concept to provide indicators to the states or Regional Administrators charged with issuing permits. Moreover, the legislation refers to the "degree of effluent reduction attainable." This too suggests a spread of numbers. Congress wrote a directive to establish the boundaries for reduction of waste discharges from various industrial categories based on existing plant capabilities improved by 1977 treatment technologies.

The statutory scheme recognizes that there may be several practicable technologies for a given type of

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[11]The concept of guidelines has been employed in other areas of the law where a range of actions is reasonable and appropriate and strict rules are overly prohibitive and counterproductive. For example, HEW has issued guidelines for school desegregation plans. *See United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966). The Council on Environmental Quality has issued guidelines to aid in the implementation of Section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. §4332(2)(c). *See Greene County Planning Board v. FPC*, 455 F.2d 412 (2d Cir. 1972). Further, the FWPCA employs a guidelines concept in other circumstances. Section 204(b)(2), 33 U.S.C. §1284(b)(2).

industrial operation that achieve differing results depending upon particular circumstances, such as raw waste load, climate, ability of an individual plant site or process to accommodate or link onto the control technology and other variables.

Congress, recognizing the complexity of the problem, chose to cast the program in a flexible mold. It is significant that Section 304 does not direct EPA to issue regulations *establishing* effluent limitations taking certain factors into account. EPA must issue guidelines and *specify* factors to be applied in determining the technology "*applicable* to any point source." (Emphasis added.)

2. The Legislative History Of Section 304 Confirms That Congress Intended That The Administrator Promulgate Flexible Guidelines, In The Form Of A Range, And Specify Factors Which The Permit-Granting Authorities Are To Consider In Issuing Permits.

API's reading of Section 304 is not only sensible but also has firm roots in the FWPCA's legislative history, manifesting the congressional understanding that Section 304 requires guidelines providing a range of effluent limitations.

a) Prior Legislation

The focal point of the Federal Water Pollution Control Act of 1965, as amended, 33 U.S.C. §1151 *et seq.*, was water quality standards. The states were charged with setting use criteria for the various bodies of water within a particular state. Chemical profiles were then drawn and criteria established to guarantee the suitability of the stream for the designated use. A body of water classified for industrial use would require a different profile than

would a stream identified for recreation. S. Rep. No. 414, 92d Cong., 1st Sess. 405 (1971), reprinted in *Environmental Policy Division of the Congressional Reference Service, A Legislative History of the Water Pollution Control Act Amendments of 1972* (hereinafter *"Leg. Hist."*) at 1422-23.

Having established a profile for stream and water quality criteria, states were then supposed to develop implementation plans restricting sources discharging into the stream to levels of pollution compatible with the criteria necessary for the designated use. *Id.*

When the Senate Subcommittee hearings began, it focused upon S. 523, introduced by Senator Muskie, which continued the water quality approach.[12] While Congress was reviewing the 1965 legislation, EPA was attempting to create a new regulatory framework for coping with industrial pollution. The approach took the form of a permit program for industrial point source dischargers through the use of the newly rediscovered Rivers and Harbors or Refuse Act of 1899, 33 U.S.C. §407.

The thrust of the administratively developed Refuse Act Permit Program (hereinafter "RAPP") was to tie individual dischargers to specific effluent restrictions based upon the development of effluent guidelines.[13]

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[12]Congress, in its review of the 1965 legislation, initially focused on amendments that would preserve the basic water quality standards approach but clarify its intention that implementation plans should include "effluent requirements" as well. Such requirements were to be developed by states in light of information collected by EPA. Violations of the requirements were directly enforceable. *Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong., 1st Sess. pt. 1, at 213 (1971).

[13]Prior to announcement of the Refuse Act Permit Program on December 23, 1970, EPA had contracted for research and studies

[Footnote continued]

The guidelines were an attempt to implement the concept of "secondary treatment" so that EPA's regional officials and officials from qualified states could have a reference point for issuing individual permits. The specifics of this program were communicated to the Senate Committee on Public Works at a time when that Committee was examining the 1965 Water Pollution Control Act seeking to strengthen it with a stronger federal-state program. *See CPC Int'l, Inc. v. Train, supra* at 1040-42. The hearings before the Senate Subcommittee explored in detail EPA's plan for implementing the RAPP. *Hearings Before the Subcommittee on Air and Water Pollution, supra* at pt. 9, 4291-4415[14] The melding of the RAPP and the federal-state partnership which existed in the 1965 Act is revealed in the bill reported in October, 1971 by the Senate Committee on Public Works.[15]

b) Flexibility: The Range

The first explanation of the Senate bill contains a specific direction to the Administrator to set forth a range in the Section 304(b) regulations:

> In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These

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to determine the methods and quality of treatment for 22 basic industries. (*The National Water Permit Program*, United States Environmental Protection Agency, pp. 6-7, June 1, 1973.)

[14]*See also* S. Rep. No. 414, *supra* at 43:

> Much of the time the Committee devoted to this Act centered on an effort to resolve the existing water quality program and the separate pollution permit program developing under the 1899 Refuse Act. *Leg. Hist.* at 1461.

[15]S. Rep. No. 414, 92d Cong., 1st Sess. (1971); *Leg. Hist.* at 1415.

factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. *In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category.* S. Rep. No. 414, *supra* at 50; *Leg. Hist.* at 1468. (Emphasis added.)

The Senate Report then states that Section 304(b) "requires the Administrator . . . to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402." *Id.* at 51; *Leg. Hist.* at 1469. The House Report similarly directs the "Administrator . . . to publish . . . regulations for the establishment of effluent limitations," not regulations establishing them. H.R. Rep. No. 911, 92d Cong., 2d Sess. 107 (1972); *Leg. Hist.* at 794. The conferees, in their explanation of Section 304(b), confirm that flexibility, not rigidity, was contemplated:

> Section 304(b)(1)(B) provides that the Administrator's regulations providing guidelines for effluent limitations shall specify factors to be taken into account . . . . S. Rep. No. 1236, 92d Cong., 2d Sess. 125 (1972); *Leg. Hist.* at 308.

Finally, Senator Muskie, author of the original Senate bill and one of the conferees, reported to the Senate that:

> Section 304(b), as agreed to by the Conferees, requires that the Administrator publish regulations which shall provide *guidelines* for the establishment of the effluent limitations to be achieved by categories and classes of point sources . . . . 118 *Cong. Rec.* 16873 (daily ed. Oct. 4, 1972); *Leg. Hist.* at 171. (Emphasis added.)

c) Uniformity

The statements in the Senate and Conference Reports setting forth Congress' expectation for uniformity in the administration of the industrial point source regulatory program do not conflict with the statements suggesting that Section 304 requires a range.

The importance of uniformity was clearly articulated by the Conference Committee Report:

> Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as *uniform as possible*. The Administrator is expected to be precise in his guidelines . . . so as to assure that *similar* point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar *effluent limitations*. S. Rep. No. 1236, *supra* at 126 (1972); *Leg. Hist.* at 309. (Emphasis added.)[16]

Such statements reflect considerable dissatisfaction, expressed both to and by the Senate Subcommittee, with exclusive use of water quality standards for regulation. The water quality approach, without more, provided no uniformity in an effort to limit discharge of pollutants.[17]

d) Flexibility And Uniformity Reconciled

Those portions of the legislative history which refer to range and flexibility and those remarks that stress

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[16] *See also* 118 *Cong. Rec.* 16874 (daily ed. Oct. 4, 1972); *Leg. Hist.* at 172, for further remarks of Senator Muskie concerning his discussion of "uniformity."

[17] *See also Hearings Before the Subcommittee on Air and Water Pollution, supra* at 4358-60.

uniformity can thus be easily reconciled if the latter statements are considered in light of the 1965 legislation.

Congress intended uniformity in effort, not uniformity of effluent limitations. Unlike the 1965 Act's water quality approach, the approach established by the FWPCA requires every source to do something to achieve best practicable and best available levels of control. That does not mean the controls or the achievable results are the same for all plants, nor does it mean that no flexibility is to be allowed to permit-granting authorities. The Senate Report could not be clearer on this subject. In discussing Sections 301 and 402, the Report states:

> The program proposed by this Section [301] will be implemented through permits issued in Section 402. S. Rep. No. 414, *supra* at 42; *Leg. Hist.* at 1460.
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> * * *
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> Through the permit program established under section 402, with the help of those States which have effective programs, the Administrator and the States can and should . . . be able to apply specific effluent limitations for each industrial source. *Id.* at 44; *Leg. Hist.* at 1462.
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> * * *
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> The information on the technology of control developed under section 304 should facilitate the administration of [the Section 402 permit] system. *Id. at 72; Leg. Hist.* at 1490.

The legislative history thus substantiates and emphasizes the plain meaning of Section 304 and underscores the congressional intent to provide flexibility in the context of the relationship between Sections 301, 304 and

402.[18] As the court concluded in *CPC Int'l, Inc. v. Train, supra:*

> The legislative history confirms that Congress intended to enforce *uniformity of conditions for existing plants, not by authorizing the promulgation of regulations under* §*301*, but by granting the EPA power to issue permits and to veto state-issued permits which do not comply with guidelines promulgated under §304(b). 515 F.2d at 1039. (Emphasis added.)

During recent hearings before the House Subcommittee on Investigations and Review of the Committee on Public Works,[19] the Subcommittee Chairman, Congressman Jim Wright, who had been a conferee and instrumental in hammering out the final version of the FWPCA, reiterated the congressional understanding that uniformity was not to be accomplished through inflexible national regulations:

> The task we have given you in attempting to arrive at standards of this type, and evaluate their economic and ecological impact is not an easy task. We are fully aware of that.
>
> We recognize that it would be much more convenient for an agency where it simply has one inflexible uniform and unvarying standard.

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[18] Early in the 1971 hearings, the Senate Subcommittee was on notice that a meaningful and realistic approach to effluent limitations would involve some case-by-case consideration. *See*, for example, Statement of Dr. Isaiah Gellman, Technical Director of the National Council of the Paper Industry for Air and Stream Improvement, Inc., *Hearings Before the Subcommittee on Air and Water Pollution, supra* at 4068-78.

[19] *Hearings on Implementation of the Federal Water Pollution Control Act Before the House Subcommittee on Investigations and Review of the Committee on Public Works*, 93d Cong., 2d Sess. (1974) (hereinafter "*Oversight Hearings*").

You have created subcategories, and you delineate between them.

We recognize the difficulty of our suggesting that additional subcategorizations might be desirable from a purely administrative standpoint.

I merely suggest that the word practicable was a deliberate term used for the purpose of tempering the application of a uniform and inflexible standard which might be absolutely right for one plant, but which might be devastating for another, and unnecessary for certain plants. Oversight Hearings at 491. (Emphasis added.)

This important statement goes to the very heart of whether EPA was to establish rigid numeric effluent limitations or whether EPA was to publish guidelines for effluent limitations. API submits that the latter function was the intent of Congress, particularly in view of the permit program established in Section 402 of the Act.

e) Role Of The Permit Program

If it was a preoccupation with uniformity that prompted EPA to establish a single number for broad industrial categories, the Agency took a somewhat myopic view of the legislative history of the FWPCA. EPA's interpretation negates the balance struck by Congress between state and federal responsibilities. The approach adopted by EPA reduces the permit process to a clerical rubber-stamping exercise. Qualified states and EPA's regional authorities need only look to EPA's numbers, determine the process category into which a plant falls, ascertain production levels, and then multiply.

Such a routine function can hardly be what Congress envisioned given the intense and extensive legislative debate about the desirability of delegating the permit-issuing function to qualified states. The Senate version of

Section 402 in S. 2770 provided EPA with the authority to engage in a permit-by-permit review of state-issued permits prior to their being issued. *See* S. Rep. No. 414, *supra* at 71; *Leg. Hist.* at 1489. That review was limited by the House's federalized version of Section 402 in H.R. 11896.[20] The final legislation provides the states with the opportunity to take the primary role in issuing permits and EPA with the opportunity to review state-approved permits.

The court, in *CPC Int'l, Inc. v. Train,* has already analyzed the legislative history of the FWPCA and concluded that effluent limitations were to be set in the permit-issuing process. This function during the permitting process is confirmed in the earliest testimony by the Administrator at the time the legislation was proposed and reiterated throughout the House and Senate considerations of the Act. *See CPC Int'l, Inc. v. Train, supra* at 1039-40. The same interpretation of the role of

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[20]The House Report accompanying H.R. 11896, H.R. Rep. No. 911, *supra* at 127, states:

> The Committee considered extensively the proposition that all the permits issued by the States ought to be subject to review and possible veto by the Administrator. During the Committee's hearings, the Governors and other representatives of the States, almost unanimously, stressed the need to put the maximum responsibility for the permit program in the States. They deplored the duplication and second guessing that could go on if the Administrator could veto the State decisions. The Committee believes that the States ought to have the opportunity to assume the responsibilities that they have requested. If, however, a State fails to carry out its obligations and misuses the permit program, the Administrator is fully authorized under subsection (c)(3) of this section to withdraw his approval of a State program. *Leg. Hist.* at 814.

the permit program was adopted by the Third Circuit in *American Iron and Steel Institute v. Environmental Protection Agency, supra* at 1040-47.

If further support is needed to show that it is the permit-granting authority that is to apply the Section 304 guidelines regulations, it is found in Senator Muskie's summary of the Conference Committee's deliberations:

> NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM [Section 402]
>
> The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act as to its consistency with the guidelines and requirements of the Act. Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements. 118 *Cong. Rec.* 16875 (daily ed. Oct. 4, 1972); *Leg. Hist.* at 176.

API submits that the legislative history of the FWPCA, as interpreted in the *CPC, Grain Processing* and *American Iron and Steel Institute* cases, shows that the permit-granting authorities are to apply Section 304 guidelines in establishing effluent limitations for individual point sources.

3. The Agency's Construction Of The Act Contemporaneous With Its Passage Recognized The Need For Flexible Guidelines.

API's contention that Sections 301, 304 and 402 create a program whereby general guidelines are to be issued so as to allow flexible application in the permit process is supported in the earliest pronouncements by EPA officials delivered contemporaneously with the enactment of the FWPCA. The importance of a case-by-case review at the permit-granting stage was articulated by the Administrator of EPA, the Honorable William D. Ruckelshaus, when he discussed the FWPCA after it had passed both Houses of Congress at the annual meeting of the Water Pollution Control Federation on October 11, 1972 in Atlanta, Georgia, *supra* at 20.

The policy articulated in the Administrator's speech had been embodied in the establishment, implementation and administration of the RAPP.[21] Administrator Ruckelshaus' statement should be given great weight. This Court has frequently recognized that the contemporaneous construction of a statute by one charged with its enforcement must be given substantial consideration. *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965) (and cases cited therein). Courts have generally taken particular cognizance of statements made by federal agency administrators charged with the implementation of a statute. *D.C. Federation of Civic Ass'ns, Inc. v. Volpe*, 140 U.S. App. D.C. 162, 171, 434 F.2d 436, 445 (1970).

From the initial development of the FWPCA in response to the problems of previous legislation up through and beyond the passage of the Act, there was agreement concerning EPA's role in issuing guidelines

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[21] 33 C.F.R. §209 (1971).

which were to identify technology and specify factors for the permit-granting authorities.

In summary, the language of the statute, its background and legislative history map the route Congress intended EPA to follow. That route leads to flexible administration accomplished by the publication of guidelines to assist permit-granting authorities in prescribing effluent limitations for individual plants, taking into consideration their particular characteristics.

B. A Comparison Of Section 301 And Other Provisions Of The Act Confirms The Congressional Intent To Preclude The Promulgation Of Effluent Limitations For Existing Sources By Regulation.

Section 301 of the FWPCA does not provide any authority for EPA to promulgate effluent limitations by regulations. *CPC Int'l, Inc. v. Train, supra* at 1038. In the case below, respondent cavalierly argued that Sections 301(b) and 304(b) can be combined to achieve Section 301(b) regulations because in the normal course the results of the Section 304(b) study would develop into effluent limitations under Section 301(b). As indicated earlier, Congress made a clear distinction between guidelines for effluent limitations and effluent limitations for existing point sources. Additionally, a review of other pertinent provisions of the Act shows that Congress did not intend EPA to promulgate rigid national standards for existing sources.

This is confirmed by those provisions of the Act where such national standards are expressly required. For example, such "nationally promulgated standards" were expressly mandated for new sources in Section 306(b), for toxic discharges in Section 307(a), and for pretreatment standards in Section 307(b) and (c). *See CPC Int'l, Inc. v. Train, supra* at 1038.

In providing for national standards in these areas, Congress did four things: (1) it used the term "standards," a word which takes on special meaning because of its use under the Act; (2) it expressly provided that the standards were to be published by regulation; (3) it put deadlines on the process, requiring that the Administrator publish the standards within a fixed period of time; and (4) it provided that standards were to be enforceable independent of the permit system. *See* Sections 306(e) and 307(d).

Congress' specificity in these provisions for national standards and the absence of such provisions in Section 301 demonstrate that the omission "was not an oversight." *CPC Int'l, Inc. v. Train, supra* at 1038.

Finally, Section 515 of the Act contradicts EPA's statutory interpretation. Section 515 establishes the Effluent Standards and Water Quality Information Advisory Committee. Six months before the publication of guidelines under Section 304(b) and standards under Sections 306 and 307, the Administrator is to notify the ESWQIAC of his intention to promulgate such regulations. The ESWQIAC can then hold public hearings on scientific and technical aspects of the proposed standards and guidelines. Whether or not hearings are held, the Act directs the ESWQIAC to transmit to EPA within 120 days all relevant scientific and technical information which it possesses. There is no mention of Section 301 regulations in Section 515. If EPA were intended to promulgate regulations under Section 301, "one would expect §515 to require reference to the ESWQIAC in such instances." *CPC Int'l, Inc. v. Train, supra* at 1039.

Thus, it is clear that EPA's attempt to promulgate single-number effluent limitations pursuant to Section 301(b) of the FWPCA is not only inconsistent with

Sections 304 and 402 but wholly inconsistent with all other provisions of the Act.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully submits that this Court determine that the United States district courts have jurisdiction to review guidelines for effluent limitations promulgated by the Environmental Protection Agency pursuant to Section 304(b) of the Act; that the Agency is required to promulgate guidelines for effluent limitations in the form of a range of numbers; and that the Agency is required to specify factors along with its guidelines for effluent limitations which are to be considered by the permit-granting authorities when applying the guidelines to individual point sources.

Respectfully submitted,

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DAVID R. BERZ
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July 16, 1976

APPENDICES

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

May 7, 1976

Thomas H. Truitt, Esq.
Truitt, Fabrikant, Bucklin & Lenzner
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: E. I. duPont de Nemours, et al. v.
Russell Train, et al., No. 75-978

Dear Mr. Truitt:

Your letter of May 3 to Assistant Attorney General Taft has been referred to me.

In response to your request, I hereby consent to your filing a brief amicus curiae in the above-captioned case on behalf of the American Paper Institute.

Sincerely,

/s/Robert H. Bork
Robert H. Bork
Solicitor General

APPENDIX B

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

(202) 223-2151

Cable: Cleargolaw Washington
Telex: 64179

July 1, 1976

Thomas H. Truitt, Esq.
Truitt, Fabrikant, Bucklin & Lenzner
910 Seventeenth Street, N.W.
Washington, D. C. 20006

Re: E. I. duPont de Nemours & Company, et al., v. Russell E. Train, et al., No. 75-978 In the Supreme Court of the United States

Dear Mr. Truitt:

In response to your request, I hereby consent to your filing a brief *amicus curiae* in the above entitled case on behalf of the American Paper Institute.

Very truly yours,

/s/Robert C. Barnard
Robert C. Barnard
Attorney for Petitioners

APPENDIX C

STATUTES INVOLVED

Section 301, 33 U.S.C. § 1311, states:

"Sec. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

"(b) In order to carry out the objective of this Act there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

"(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

"(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to

any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

"(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; and

"(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act.

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to

any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

"(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

"(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

"(f) Notwithstanding any other provisions of this Act it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

Section 302, 33 U.S.C. § 1312, states:

"Sec. 302. (a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point

source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

"(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

"(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

"(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act.

Section 304, 33 U.S.C. §1314, states:

"Sec. 304. (a)(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one

year after the date of enactment of this title (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

"(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after the date of enactment of this title (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 303, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

"(3) Such criteria and information and revisions thereof shall be issued to the States and shall be

published in the Federal Register and otherwise made available to the public.

"(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

"(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

"(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

"(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

"(c) The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after enactment of this title (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 306 of this Act. Such infor-

mation shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

"(d)(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after enactment of this title (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

"(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after the date of enactment of this title (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 201 of this Act.

"(e) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 208 of this Act, within one year after the effective date of this subsection (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

"(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

"(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

"(C) all construction activity, including runoff from the facilities resulting from such construction;

"(D) the disposal of pollutants in wells or in subsurface excavations;

"(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

"(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

"(f)(1) For the purpose of assisting States in carrying out programs under section 402 of this Act, the Administrator shall publish, within one hundred and twenty days after the date of enactment of this title, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

"(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

"(g) The Administrator shall, within one hundred and eighty days from the date of enactment of this title, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act or permit application pursuant to section 402 of this Act.

"(h) The Administrator shall (1) within sixty days after the enactment of this title promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 402 of this Act, and (2) within sixty days from the date of enactment of this title promulgate guidelines establishing the minimum procedural and other elements of any State program under section 402 of this Act which shall include:

"(A) monitoring requirements:

"(B) reporting requirements (including procedures to make information available to the public);

"(C) enforcement provisions; and

"(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his

income directly or indirectly from permit holders or applicants for a permit).

"(i) The Administrator shall, within 270 days after the effective date of this subsection (and from time to time thereafter), issue such information on methods, procedures, and processes as may be appropriate to restore and enhance the quality of the Nation's publicly owned fresh water lakes.

"(j)(1) The Administrator shall, within six months from the date of enactment of this title, enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior to provide for the maximum utilization of the appropriate programs authorized under other Federal law to be carried out by such Secretaries for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 208 of this Act.

"(2) The Administrator, pursuant to any agreement under paragraph (1) of this subsection is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, or the Secretary of the Interior any funds appropriated under paragraph (3) of this subsection to supplement any funds otherwise appropriated to carry out appropriate programs authorized to be carried out by such Secretaries.

"(3) There is authorized to be appropriated to carry out the provisions of this subsection, $100,000,000 per fiscal year for the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974.

Section 306, 33 U.S.C. § 1316, states:

"Sec. 306. (a) For purposes of this section:

"(1) The term 'standard of performance' means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

"(2) The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

"(3) The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

"(4) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a source.

"(5) The term 'construction' means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

"(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

"pulp and paper mills;
"paperboard, builders paper and board mills;
"meat product and rendering processing;
"dairy product processing;

"grain mills;
"canned and preserved fruits and vegetables processing;
"canned and preserved seafood processing;
"sugar processing;
"textile mills;
"cement manufacturing;
"feedlots;
"electroplating;
"organic chemicals manufacturing;
"inorganic chemicals manufacturing;
"plastic and synthetic materials manufacturing;
"soap and detergent manufacturing;
"fertilizer manufacturing;
"petroleum refining;
"iron and steel manufacturing;
"nonferrous metals manufacturing;
"phosphate manufacturing;
"steam electric powerplants;
"ferroalloy manufacturing;
"leather tanning and finishing;
"glass and asbestos manufacturing;
"rubber processing; and
"timber products processing.

"(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technol-

ogy and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

"(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

"(3) The provisions of this section shall apply to any new source owned or operated by the United States.

"(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure that the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

"(d) Notwithstanding any other provision of this Act, any point source the construction of which is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954, whichever period ends first.

"(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 307, 33 U.S.C. §1317, states:

"Sec. 307. (a)(1) The Administrator shall, within ninety days after the date of enactment of this title, publish (and from time to time thereafter revise) a list which includes any toxic pollutant or combination of such pollutants for which an effluent standard (which may include a prohibition of the discharge of such pollutants or combination of such pollutants) will be established under this section. The Administrator in publishing such list shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms.

"(2) Within one hundred and eighty days after the date of publication of any list, or revision thereof, containing toxic pollutants or combination of pollutants under paragraph (1) of this subsection, the Administrator, in accordance with section 553 of title 5 of the United States Code, shall publish a proposed effluent standard (or a prohibition) for such pollutant or combination of pollutants which shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or

potential presence of the affected organisms in any waters, the importance of the affected organisms and of the nature and extent of the effect of the toxic pollutant on such organisms, and he shall publish a notice for a public hearing on such proposed standard to be held within thirty days. As soon as possible after such hearing, but not later than six months after publication of the proposed effluent standard (or prohibition), unless the Administrator finds, on the record, that a modification of such proposed standard (or prohibition) is justified based upon a preponderance of evidence adduced at such hearings, such standard (or prohibition) shall be promulgated.

"(3) If after a public hearing the Administrator finds that a modification of such proposed standard (or prohibition) is justified, a revised effluent standard (or prohibition) for such pollutant or combination of pollutants shall be promulgated immediately. Such standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

"(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

"(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

"(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such stand-

ard, but in no case more than one year from the date of such promulgation.

"(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

"(b)(1) The Administrator shall, within one hundred and eighty days after the date of enactment of this title and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 212 of this Act) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 212 of this Act) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works.

"(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

"(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall

designate the category or categories of sources to which such standard shall apply.

"(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

"(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 306 if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 306 for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

"(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

Section 309, 33 U.S.C. §1319, states:

"Sec. 309. (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, or 308 of this Act in a permit issued by a State under an approved permit program under section 402 of this Act, he shall proceed under his authority in paragraph (3) of

this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

"(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of 'federally assumed enforcement'), the Administrator shall enforce any permit condition or limitation with respect to any person –

"(A) by issuing an order to comply with such condition or limitation, or

"(B) by bringing a civil action under subsection (b) of this section.

"(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

"(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

"(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

"(c)(1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, shall be punished

by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

"(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

"(3) For the purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

"(d) Any person who violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

"(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the muni-

cipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

Section 401, 33 U.S.C. §1341, states:

"Sec. 401. (a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal

application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

"(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

"(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 306, and 307 of this Act because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 301, 302, 306, or 307 of this Act.

"(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide

an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 301, 302, 306, or 307 of this Act.

"(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this Act that such facility or activity has been operated in violation of the applicable provisions of section 301, 302, 306, or 307 of this Act.

"(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

"(7) Except with respect to a permit issued under section 402 of this Act, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after

April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

"(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

"(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

"(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with

any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Section 402, 33 U.S.C. § 1342, states:

"Sec. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

"(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

"(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March

3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

"(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable

waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A)

new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

"(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

"(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

"(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

"(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

"(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

"(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

"(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

"(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

"(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

"(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of

sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

Section 502, 33 U.S.C. §1362, states:

"Sec. 502. Except as otherwise specifically provided, when used in this Act:

"(1) The term 'State water pollution control agency' means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

"(2) The term 'interstate agency' means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial

powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

"(3) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

"(4) The term 'municipality' means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

"(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

"(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

"(7) The term 'navigable waters' means the waters of the United States, including the territorial seas.

"(8) The term 'territorial seas' means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

"(9) The term 'contiguous zone' means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

"(10) The term 'ocean' means any portion of the high seas beyond the contiguous zone.

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

"(12) The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

"(13) The term 'toxic pollutant' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of

information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"(14) The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

"(15) The term 'biological monitoring' shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

"(16) The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

"(17) The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

"(18) The term 'industrial user' means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category 'Division D—Manufacturing' and such other classes of significant waste

producers as, by regulation, the Administrator deems appropriate.

"(19) The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

Section 505, 33 U.S.C. § 1365, states:

"Sec. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

"(b) No action may be commenced—

"(1) under subsection (a)(1) of this section—

"(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the

alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

"(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

"(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

"(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

"(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

"(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

"(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

"(f) For purposes of this section, the term 'effluent standard or limitation under this Act' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

"(g) For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected.

"(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

Section 509, 33 U.S.C. §1369, states:

"Sec. 509. (a)(1) For purposes of obtaining information under section 305 of this Act, or carrying out section 507(e) of this Act, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"(2) The district courts of the United States are authorized, upon application by the Administrator, to

issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 304 (b) and (c) of this Act. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

"(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

"(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this Act required to be made on the

record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

APPENDIX D

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20460

March 25, 1974

Office of
Enforcement and General Counsel

Thomas H. Truitt, Esquire
Truitt and Fabrikant
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Truitt:

This is in response to your March 18, 1974, letter requesting a hearing on the effluent limitations guidelines for the builders paper and board manufacturing point source category and the pulp, paper and paperboard manufacturing point source category which were proposed on January 14 and January 15, 1974, pursuant to Sections 301 and 304 of the Federal Water Pollution Control Act, as amended. As you know, Water Pollution Control Act, as amended. As you know, sections 301 and 304 of the FWPCA do not require that a hearing be held prior to promulgation of effluent limitation guidelines. The general rulemaking requirements of Section 553 of the Administrative Procedure Act only require that notice and opportunity to comment on proposed regulations be provided. A substantial opportunity for comments by the industry has been provided both in connection with the draft development

document, which was made available for review and comment in July, 1973, and in connection with the proposed regulations. Moreover, a hearing was held on these guidelines by the Effluent Standards and Water Quality Information Advisory Committee. For these reasons we do not believe that a hearing is required before promulgation of these guidelines.

However, because of your concern over the guidelines and the interest of your client in discussing these matters with EPA, we believe that it is possible to hold a technical meeting on the proposed regulations which would permit you to explain orally your comments on the guidelines and to discuss the matters with EPA personnel. Because of the time constraints imposed by the court order, it is necessary that such a meeting be held quite soon. We have scheduled it for Thursday, April 4, in Room 1112, Crystal Mall Building #2, 1921 Jefferson Davis Highway, Arlington, Virginia, beginning at 8:00 a.m. We have notified all individuals who commented on the proposed guidelines by telegram to advise them of this meeting and of their opportunity to attend.

It will be necessary for all participants to cooperate in making the meeting function smoothly. We will only be able to hold the meeting for a day and we suggest that the various parties consolidate their points of discussion and have them presented by one person, such as a lead counsel. We also request that comments which have been adequately dealt with in written comments not be repeated so that the meeting serve to develop further information and clarify existing points of confusion. I must emphasize that while EPA personnel will be available to discuss the comments and questions raised by the industry, this is not an adjudicatory hearing where

EPA personnel, or industry representatives, will be subjected to cross-examination regarding their statements.

I believe that if all parties cooperate and follow this format, an effective exchange of information can occur which will satisfy your request but which will not impede compliance with the court order. If you have any questions about this matter, please get in touch with Bill Frick.

Very truly yours,

/s/Robert V. Zener
for Alan G. Kirk II
Assistant Administrator for Enforcement
and General Counsel (EG-329)